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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAM J. ALT, M.D.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the imposition of overwhelmingly disproportionate civil penalties constitute a second punishment where petitioner had previously been punished for the criminal offenses which constituted the *sine qua non* for the subsequent civil penalties?

2. Whether federal internal revenue service civil penalties, including interest-on-interest, exceeding five million dollars for an underlying one million dollar civil tax liability can survive double jeopardy scrutiny in light of *United States v. Halper*, 490 U.S. 435 (1990) as clarified in *United States v. Ursery*, ___ U.S. ___, 116 S.Ct. 2135 (1996)?

PARTIES TO THE PROCEEDING

The following is a list of the parties to the litigation below. Petitioner, William J. Alt, was the only appellant appearing in case no. 95-1124 in the United States Court of Appeals for the Sixth circuit.

The opinion below lists Rosalinda Alt, Karen Alt and Robert W. Alt as party-defendants. All were defendants, along with petitioner, in the civil case filed by the government under the name and style *United States v. William J. Alt, et al.*, 1:92-CV-657. That civil tax case was brought in the United States District Court for the Western District of Michigan on November 15, 1992.

The United States was the only plaintiff in these proceedings.

CERTIFICATE OF INTEREST

The Petitioner, WILLIAM J. ALT, M.D., is represented in these proceedings by Attorney Allan A. Ackerman, Esq., 2000 N. Clifton Avenue, Chicago, Illinois, 60614. Petitioner's counsel has no interest in these proceedings other than those of the petitioner.

Allan A. Ackerman

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PETITION FOR WRIT OF CERTIORARI

Petitioner, William J. Alt, respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit entered in this case.

OPINIONS BELOW

The district court's December 29, 1994 memorandum decision is unreported. The May 15, 1996 opinion and judgment of the United States Court of Appeals for the Sixth Circuit affirming the district court's judgment is reported at 83 F.3d 779 (6th Cir. 1996) and is reproduced at pages 1a to 10a of the appendix to this petition.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit, having had jurisdiction pursuant to 28 U.S.C. § 1291, issued its decision on May 15, 1996. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be subject for the same offence to be twice put in jeopardy of life or limb . . .

The pertinent text of 26 U.S.C. §§§ 6653, 6661 and 6662 are set forth, respectively, at pages 17a to 22a of the appendix to this petition.

STATEMENT

1. Prior to indictment, William J. Alt, M.D. (petitioner), was a respected sixty-two-year-old board certified internist specializing in geriatric cardiology. He had been practicing medicine in the Kalamazoo, Michigan area for over thirty years. The record is barren of any problems with the Internal Revenue Service prior to the 1990 indictment.

On April 3, 1990, petitioner was a named defendant in a five-count indictment filed in the United States District Court for the Western District of Michigan. The indictment alleged that petitioner and his co-defendant-daugh-

ter, Karen Alt, conspired to evade and attempt to evade federal income taxes from on or about January 1, 1981 to April 3, 1990. Count one charged a conspiracy in violation of 18 U.S.C. § 371 and 26 U.S.C. § 7201. Counts two to four alleged illegalities in petitioner's medical corporate and individual tax returns for the years 1984 and 1985. Count five charged Karen Alt with committing perjury in a prior civil district court proceeding. A jury trial culminated in petitioner being convicted on counts one and three. On June 7, 1991 petitioner was sentenced to ten years of federal immurement and fined $200,000.00. The government opposed release pending appeal and petitioner's request for appellate enlargement was denied. He commenced the service of sentence on July 7, 1991.

2. On September 15, 1992, while petitioner was serving his federal prison sentence, the government filed a civil complaint alleging that petitioner and his spouse, Rosalinda, owed the government several millions of dollars for the tax years 1981-1990. The civil complaint alleged, in pertinent part, that petitioner and his spouse owed the government over five million dollars based on their assessed tax deficiency for the years 1981-1990 (totaling approximately one million dollars). The approximate four million dollar difference was based on penalties and interest (and interest on interest) that the government claimed was owed.

3. On June 18, 1993 the United States Court of Appeals for the Sixth Circuit granted petitioner a new trial, *United States v. Alt*, 996 F.2d 827 (6th Cir. 1993). On May 24, 1994 petitioner, represented by appointed counsel, pled guilty to a single misdemeanor offense alleging a violation of 26 U.S.C. § 7203 for the tax year 1984.

The original indictment was dismissed. Petitioner was sentenced to time served (R. 99, pp. 10-11).[1]

4. On October 24, 1994 petitioner, absent counsel, appeared in the United States District Court, Grand Rapids, Michigan in connection with for a status conference on the government's civil lawsuit (R. 109). Petitioner sought to raise constitutional claims. *Id.* at 10-11. Government counsel advised that the case was perplexing and complex. *Id.* at 12. Rather than continue the potential civil trial date, the United States magistrate judge elected to maintain the district court's November 1994 trial setting. *Id.*

5. On November 8, 1994 petitioner, his spouse and members of his family appeared before the Honorable Benjamin F. Gibson in the United States District Court, Grand Rapids, Michigan. The entire family was represented by a single attorney. The government filed a second amended complaint, absent objection (R. 104 at pp. 6-10). The government's case was presented by stipulation with the caveat that defense counsel could submit post-trial pleadings directed toward constitutional issues (*Id.* at p. 10).

On December 29, 1994 Judge Gibson filed a memorandum decision finding that petitioner and his spouse owed over five million dollars, with diurnal escalating statutory penalties, based upon original assessed tax liabilities totalling approximately one million dollars. The dis-

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[1] Karen Alt had been sentenced to ten-years in custody on June 7, 1991. On conviction vacation, she pled guilty to an IRS felony count and was sentenced to time served. The sentencing judge, recognizing the family's destitute circumstances, imposed neither fines nor prosecution costs.

trict court rejected petitioner's double jeopardy importunings (Vol. 5, R. 100; App. 14a, *infra*).

Petitioner appealed, arguing both that the IRS civil penalties violated the Double Jeopardy Clause, and that the Excessive Fines Clause of the Eighth Amendment mandated that the district court engage in balancing the putative wrongs against the penalties imposed. The court of appeals rebuffed both arguments, *United States v. Alt*, 83 F.3d 779, 781-3 (6th Cir. 1996).

REASONS FOR GRANTING THE WRIT

The Court should resolve the unsettled question of what standards apply in determining whether overwhelmingly disproportionate IRS civil penalties can survive double jeopardy scrutiny where the petitioner has already served a prison sentence for the same offenses.

1. In *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892 (1989), the Court affirmed a district court decision applying the Double Jeopardy Clause. The Court held that disproportionate civil penalties were subject to double jeopardy constraints where the defendant suffered an earlier conviction and prison sentence for the same acts. In part, the Court noted:

> Rather, we hold merely that in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated.[2]

* * * *

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[2] 109 S.Ct. at 1901, n. 7.

> Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an account of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.[3]
>
> * * * *
>
> In the case before us, I agree with the Court that the controlling circumstance is whether the civil penalty imposed in the second proceeding bears any rational relation to the damages suffered by the Government. Here it does not, so it must be considered punishment for purposes of the Double Jeopardy Clause.[4]

Petitioner's case bears a marked resemblance to *Halper*. Both defendants suffered antecedent criminal convictions. Both served prison sentences. During petitioner's immurement, the government sought civil penalties predicated on the same conduct which gave rise to the criminal conviction. The civil penalties in both *Halper* and at bar bore no reasonable relationship to the government's loss.

2. In *Montana Department of Revenue v. Kurth Ranch*, 511 U.S. ___, 1214 S.Ct. 1937 (1994), the Court held that the Double Jeopardy Clause precluded the imposition of a Montana drug tax following an antecedent Montana criminal drug conviction. The Court's opinion includes:

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[3] 109 S.Ct. at 1902 (n. 9 omitted).

[4] 109 S.Ct. at 1904 (concurring opinion by Justice Kennedy).

> Although we have never held that a tax violated the Double Jeopardy Clause, we have assumed that one might. In the context of other constitutional requirements, we have repeatedly examined taxes for constitutional validity. We have cautioned against invalidating a tax simply because its enforcement might be oppressive or because the legislature's motive was somehow suspect, * * * *Yet we have also recognized that "there comes a time in the extension of the penalizing features of the so-called tax when it loses it character as such and becomes a mere penalty with the characteristics of regulation and punishment."* * * * That comment, together with *Halper's* unequivocal statement that labels do not control in a double jeopardy inquiry, *indicates that a tax is not immune from double jeopardy scrutiny simply because it is a tax.*[5]

Kurth implies that federal tax civil penalties fall within the ambit of the Double Jeopardy Clause shelter. If so, this petitioner squarely presents the question of whether disproportionate federal civil tax penalties are proscribed by the Double Jeopardy Clause where there is an antecedent criminal prosecution and conviction predicated on the same underlying acts.

3. In *United States v. Ursery*, ___ U.S. ___, 116 S.Ct. 2135 (June 24, 1996), the Court held that the Double Jeopardy Clause has no impact on civil forfeitures as they might relate to antecedent or subsequent criminal prosecutions. *Ursery* resolved the lack of circuit symmetry. In a nutshell, the *Ursery* decision found there are no double jeopardy implications in the context of criminal prosecutions-civil forfeitures. In *Ursery*, the Chief Justice

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[5] 114 S.Ct. 1937, at 1945-46 (1994); internal citations and footnote—omitted; italicized emphasis added.

traced the distinctions between civil forfeiture and civil penalties, citing *United States v. Halper*, 116 S.Ct. at 2144. The *Ursery* opinion notes:

> In *Halper*, we considered "whether and under what circumstances a civil penalty may constitute 'punishment' for double jeopardy analysis." * * *[6]

Ursery continued, noting that double jeopardy protections *clearly applied* to civil penalties, not civil forfeitures. *Id. Halper* had a narrow focus: the distinction between civil penalties and civil forfeiture. In connection with civil penalties, the Court has balanced the size of the particular civil penalty against the government's harm. *Id.*[7]

At bottom, *Ursery* perpetuates the proposition that the Double Jeopardy Clause applies to civil penalties, *albeit* not civil forfeitures.[8]

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[6] 116 S.Ct. at 2143.

[7] Citing *Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1956) and *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (in *Rex Trailer*, the Court held that the fines were not "so unreasonable or excessive" as to transform a civil remedy into a criminal penalty; in *Marcus*, the fine was not so disproportionate as to transform the fine into punishment).

[8] Chief Justice Rehnquist, responding to the dissent of Justice Stevens, noted a potential exception: . . . Where the "clearest proof" indicates that an *in rem* civil forfeiture is "so punitive either in purpose or effect" as to be equivalent to a criminal proceeding, that forfeiture may be subject to the Double Jeopardy Clause . . ., 116 S.Ct. at 2148, n. 3.

In the event the Court concludes that the IRS actions at bar are the equivalent of an *in rem* civil forfeiture, the Court may grant relief on that independent ground. Petitioner has presented *clear proof* that the IRS actions are [so] punitive in purpose and effect as to be equivalent to a criminal forfeiture.

4. The case at hand questions whether grossly disproportionate IRS civil penalties, including interest-on-interest, *ad infinitum* are proscribed by the Double Jeopardy Clause.

Two circuit opinions considering the question presented, have ruled harmoniously. Each has eschewed double jeopardy applications to civil IRS penalties, albeit under decidedly different facts from those at bar.

In *McNichols v. CIR*, 13 F.3d 432 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994), the court affirmed an order below finding *McNichols* civilly liable for IRS deficiencies and penalties arising from his illegal drug trafficking activities. In *McNichols*, the plaintiff was a convicted dope dealer who had executed a plea agreement transferring his ill-gotten booty to the government. Within the fabric of that agreement, the plaintiff's monies and property (stipulated to have been derived from dope peddling) went to the government, either by way of an agreed forfeiture or IRS procedures, 13 F.3d at 433. After his plea agreement was enforced and the agreed ten-year sentence imposed, the plaintiff apparently had second thoughts, urging that he be relieved of some of the burdens of his ill-conceived agreement. The court would have none of it; flatly rejecting *McNichol's* double jeopardy theorem:

> *Halper* involved a specific statutory penalty. The circumstances giving rise to the double jeopardy violation were unique. To use *Halper* as a base for vaulting into the tax arena would be to misapply the case and distort its holding. We hold that there was no double jeopardy violation.[9]

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[9] 13 F.3d at 435.

In *Thomas v. CIR*, 62 F.3d 97 (4th Cir. 1995), the court reviewed whether double jeopardy principles precluded the assessment of additional IRS penalties on unreported drug trafficking income. *Thomas* was convicted of drug dealing and money laundering based on plea agreements. As part of the plea, *Thomas* agreed to forfeit his assets, 62 F.3d at 98. Stipulating that he failed to report his income from illegal narcotic sales, *id.*, he challenged only the fraud and interest penalties on the deficiency. *Thomas'* agreed IRS deficiency was $259,000. The combined penalties were $44,068. While affirming the tax court ruling in favor of the Commissioner, the *Thomas* panel held there was a reasonable relationship between the enhanced federal tax liabilities and the government's expenses (losses), 62 F.3d at 100-101. The panel further found that *Thomas* had neither been charged nor convicted of federal IRS offenses and thus, for double jeopardy purposes there was no multiple *punishments* for the same course of conduct. *Id.* at 100.

5. In the case at bar, the court of appeals rejected petitioner's double jeopardy assertions, noting:

> That the penalties are not outrageous in light of this purpose. The fraud penalty is the most onerous, set at fifty or seventy-five percent of the lost tax revenue. The heavy penalty for fraud may be explained by the fact that actively fraudulent filings are more difficult to catch than merely negligent ones. The understatement penalty and negligence penalties, set at twenty-five and five percent respectively, are simply not the type of unusual burden that Halper was meant to police. (App. 7a)

While eschewing the grant of relief, the court of appeals noted that petitioner and his spouse had been ordered to pay $5,053,042.08 as of December 29, 1994.

Inexplicably, the court of appeals found the difference between petitioner's tax liability (slightly over one and a half million dollars) and the amount owed (over five million) to have a differential of slightly over two million dollars (App. 6a). Hence, *Halper* lacked application.

Petitioner asserts that with reasonable mathematical certainty the difference between the amount originally ($1,644,027) and the amount owed in December 1994 ($5,053,042.08) equals $3,409,015.08. Apropos of the inability of lawyers to grasp tax (and perhaps arithmetic) abstractions is a reckoning from *Bursten v. United States*, 395 F.2d 976, 981 (5th Cir. 1968), which notes:

> We must note here, as a matter of judicial knowledge, that most lawyers have only scant knowledge of the tax laws.

Halper's double jeopardy analysis is to be applied on a case-by-case basis. Yet, the Court has not articulated standards for *Halper's* application. Here (rounding off dollars), petitioner's assessed tax liability was one million dollars. Statutory penalties, including interest and interest-on-interest, brought the figure owed the IRS to in excess of five million dollars. The statutory penalties (including interest-on-interest) escalate daily. Lacking guidance from this Court, there is no constitutional impediment to *Halper's* application.

6. In the ensemble, the courts of appeals have shunned *Halper's* double jeopardy entreaties. But, petitioner's case is a far cry from the two appellate decisions analyzing *Halper* in light of plea agreements, endowing property and tax dollars to the government (*McNichols* and *Thomas*, *ante*).

In petitioner's case, the government has never disputed that the civil penalties arose from the same facts, circumstances and criminal offenses giving rise to petitioner's original multi-count indictment, conviction and immurement. Rather, the government's consistent posture has been that *Halper* has no application to the Internal Revenue laws of the United States.

Does *Halper's* double jeopardy analysis have application to the federal Internal Revenue statutes? This petition provides an appropriate vehicle to resolve that unsettled question.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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